IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 98 of 1980

in

FIRST APPEALNo 517 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and

MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No : NO

2. To be referred to the Reporter or not? No :

3. Whether Their Lordships wish to see the fair copy of the judgement? No : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No : NO

5. Whether it is to be circulated to the Civil Judge? No :

BAI KAUSHYALYABEN RAMANLAL

Versus

RAMANLAL ISHWARBHAI PATEL,

Appearance:

MS KALPANA BRAHMBHATT for MS VASUBEN P SHAH,
advocate for Appellant
MR MC SHAH for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE A.M.KAPADIA

Date of decision: 11/01/2000

ORAL JUDGEMENT

(Per : Panchal,J.)

This is an appeal under Clause 15 of the Letters Patent by the wife challenging judgment and decree dated January 31, 1980, rendered by the learned Single Judge, in First Appeal No. 517/78, by which decree of divorce passed under section 13(1-A)(ii) of the Hindu Marriage Act, 1955 in favour of the respondent is confirmed.

2. The appellant-wife was married to the respondent according to hindu rites on May 22, 1969 in Ahmedabad. The marriage was registered with the Registrar of Marriages in Ahmedabad on May 26, 1969. Subsequent to the marriage,the respondent-husband, according to the wife, contracted second marriage and deserted the wife for a period of 3 years. Under the circumstances, wife filed a petition under section 9 of the Hindu Marriage Act, 1955 ("the Act" for short) for a declaration that she was lawfully wedded wife of the respondent as well as for restitution of conjugal rights. The petition for restitution of conjugal rights was contested by the respondent on several grounds, but the principal defence taken-up by the respondent was that the appellant was not his legally wedded wife and was, therefore, not entitled to decree for restitution of conjugal rights. In the said petition, voluminous evidence was led by the parties. On appreciation of evidence led by the parties, the learned Judge, City Civil Court, Ahmedabad deduced that the present appellant was legally wedded wife of the respondent. On evidence it was found that the respondent had withdrawn from the wife's society without any reasonable excuse within the meaning of section 9 of the Act. Therefore, the learned Judge allowed the petition for restitution of conjugal rights by judgment dated January 31, 1975. Feeling aggrieved by the said decree, the respondent preferred First Appeal No.776 of 1975 in the High Court, but the appeal was dismissed vide judgment dated August 25, 1976. Thereafter the respondent served a notice dated September 15, 1976 on the appellant calling upon her to stay with him in terms of decree for restitution of conjugal rights. The wife gave reply informing the respondent that she was ready and willing to stay with him provided he was inclined to give-up company of Shardaben. According to the respondent, there was no restitution of conjugal rights as between the parties to the marrige for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties and, therefore, he instituted Hindu Marriage Petition No. 221 of 1977 in the City Civil

Court, Ahmedabad under section 13(1-A)(ii) of the Act and prayed for dissolution of marriage by a decree of divorce.

3. The petition for dissolution of marriage by decree of divorce was contested by the present appellant vide written statement at Exh.8. In the reply, it was inter-alia, contended that after the passing of the decree for restitution of conjugal rights, the respondent had not taken any steps to comply with the said decree, but had challenged the said decree by filing an appeal and continued to stay with one Shardaben Nanubhai Patel, who had given birth to 2 children and as the respondent was taking advantage of his own wrong, petition for dissolution of marriage by decree of divorce should be dismissed. Upon rival assertions of the parties, necessary issues for determination were raised by the learned Judge at Exh.20. In support of his case pleaded in the petition for dissolution of marriage by decree of divorce, the respondent examined himself at Exh.21; whereas in order to substantiate the averments made in the written statement, present appellant examined herself at Exh.44. The parties to the petition also produced documentary evidence in support of their respective case. On appreciation of evidence adduced by the parties, the learned Trial Judge held that the respondent was entitled to dissolution of marriage with the appellant by decree of divorce on the ground that there was no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in the proceeding to which they were parties. The learned Judge negatived the contention raised by the present appellant to the effect that by continuing to live with Shardaben in adultery, the respondent was taking advantage of his own wrong within the meaning of section 23(1)(a) of the Act. In view of these conclusions, the learned Judge dissolved marriage between the parties by the decree of divorce dated March 31, 1978.

4. Aggrieved by the said decree, the present appellant preferred First Appeal No. 517 of 1978 in the High Court which is dismissed by the learned Single Judge vide judgment dated January 31, 1980, giving rise to the present appeal.

5. Ms. Kalpana Brahmbhatt, learned Counsel for the appellant-wife contended that the decree for restitution of conjugal rights passed in favour of the appellant was challenged by the respondent before the High Court by way of filing First Appeal and after dismissal of the appeal,

the respondent had served a notice on the appellant calling upon her to stay with him without withdrawing from the society of Shardaben and as he is guilty of misconduct, decree of divorce should have been denied to him and he should not have been permitted to take advantage of his own wrong. On the other hand, Mr. M.C.Shah, learned Counsel for the respondent-husband pleaded that the appellant knew very well that the respondent was residing with Shardaben when the petition for restitution of conjugal rights was filed by her and as the ground of adultery got exhausted after the passing of decree for restitution of conjugal rights, it cannot be said that the respondent was taking advantage of his own wrong by not withdrawing from the company of Shardaben so as to disentitle himself from obtaining decree of divorce. In support of his this submission, the learned Counsel for the respondent has placed reliance on the decisions rendered in the cases of (1) Bai Mani @ Chandramani, d/o Patel Becharbhai Narsinhbhai v. Patel Jayantilal Dahyabhai, 21 G.L.R. 66, and (2) Usha Ratilal Dave v. Arun B.Dave, 1984 G.L.H. 333.

6. We have heard the learned Counsel for the parties at length and also taken into consideration the evidence on record. It is not in dispute that the respondent was living with Shardaben at the time when the petition for restitution of conjugal rights was filed by the present appellant. Though the appellant was knowing fully well that the respondent was living an adulterous life, she had filed a petition under section 9 of the Act for a decree for restitution of conjugal rights. Section 13(1-A)(ii) of the Act allows either party to a marriage to present a petition for dissolution of the marriage by a decree of divorce on the ground that there has been no restitution of conjugal rights as between the parties to the marriage for the period specified therein after the passing of the decree for restitution of conjugal rights. Sub-section (1A) was introduced in Section 13 by Section 2 of the Hindu Marriage (Amendment) Act, 1964. Section 13 as it stood before 1964 amendment permitted only the spouse who had obtained the decree for restitution of conjugal rights to apply for relief by way of divorce. The party against whom the decree for restitution of conjugal rights was passed, was not given that right. The grounds for granting relief under section 13 including sub-section (1A) however continue to be subject to the provisions of Section 23 of the Act. Where there has been no restitution of conjugal rights between the parties to the marriage for a period of one year or upwards after a decree for restitution of conjugal rights is obtained by the wife, though a petition for divorce by

the husband is competent, it is open to the Court to refuse a decree for divorce on any of the grounds specified in section 23(1) of the Act. The right conferred by section 13(1-A) is subject to the provisions of section 23(1) and if the wife succeeds in establishing that the petitioner-husband has taken advantage of his own wrong in a petition filed under sub-section (1A) of Section 13, not only it is open to the Court to consider whether the provisions mentioned in sub-section (1) of Section 23 of the Act are satisfied, but the Court is under an obligation to consider the question whether the husband applying for a decree of divorce has taken advantage of his own wrong or not. Section 23 is in the nature of an overriding provision, not only for the reason that it governs "any proceeding" under the Act, but for the more important reason that it provides that it is only if the conditions mentioned in sub-section (1) are satisfied "but not otherwise" that the Court shall decree the relief sought. In Bai Mani (supra), the Division Bench of this Court has held that after amendment in 1964 of the Act, even the defaulting party can ask for dissolution of marriage under section 13(1-A) of the Act on satisfaction of the conditions prescribed therein. It is also observed therein that it cannot be a bone of contention between the parties that either of the spouses is under any obligation to resume co-habitation after the decree for judicial separation or restitution of conjugal rights is granted. In that case, a decree for judicial separation was granted in favour of the wife on the ground that the husband had kept a mistress. After decree, that ground continued and the husband filed a petition for dissolution of marriage by a decree of divorce. The stand which was taken-up by the wife was that the husband having continued to keep a mistress, was taking advantage of his own wrong and, therefore, was not entitled to a decree of divorce. This argument was negatived by the Division Bench of this Court in the following terms :-

> "In order to constitute a wrong within the meaning of sec.23(1)(a), the misconduct must be serious enough to justify denial of the relief to which the alleged wrong doer is otherwise entitled to. It is no doubt that the respondent-husband has admitted in his evidence before the trial Court that he has connection with his mistress and residing with her since more than 11 years and that he has got three children through her. The matrimonial offence of adultery has exhausted itself when the decree for

> judicial separation was granted to wife. It is precisely for that reason that the wife sought the decree for judicial separation. It is no doubt true that the husband is continuing to reside with his mistress. But, can it be said from that fact that it is a new fact or circumstance subsequent to the decree of judicial separation which amounts to a wrong of such a nature as to disentitle her husband to the relief which he is claiming in the present case ? It is no doubt true that it is a continuous wrong. But, therefore, it cannot be said that it is anew fact or circumstance amounting to a wrong which will stand as an obstacle in the way of the husband to successfully obtain the relief which he claims. The only way in which sec. 13(1A) and sec.23(1)(a) can be reconciled is that there must be some facts or circumstances occurring after the decree for judicial separation, which, if amounting to substantial wrong that in granting a decree for divorce to a defaulting party or a wrong doer, would amount in the circumstances in giving advantage of his own wrong. It cannot be said that he is taking advantage of his own wrong when he makes an application for divorce though continuously residing with his mistress after the judicial separation has been granted. As a matter of fact, he is trying to exercise his right granted under the amending provision of the Act."

7. The only pertinent question which, therefore, arises for our consideration is whether the continuance on the part of the husband in adulterous course of life by staying with his mistress would amount to such a wrong as to disentitle him to decree of divorce in view of the provisions of section 23(1)(a) of the Act. As observed earlier,the appellant was knowing fully well that the respondent was living in adultery with Shardaben when the petition for restitution of conjugal rights was filed by her. It is relevant to notice that though decree for restitution of conjugal rights was passed by the Court in favour of the appellant, it was not a conditional decree asking the husband to drive away his mistress and fulfil marital obligations with the appellant. The conduct which should weigh under section 23(1)(a) of the Act cannot have reference to remitting the wrong which led to the decree for restitution of conjugal rights, but it must be in the nature of subsequent conduct of the husband which may be so reprehensible or repulsive to the conscience of the court that to grant a decree to such

party committing such a wrong would be giving premium for such a wrong. In order to constitute a wrong within the meaning of sectioin 23(1)(a), the misconduct must be serious enough to justify denial of the relief to which the alleged wrong doer is otherwise entitled to. In view of the principles laid down by the Division Bench in Bai Mani (supra), we are of the opinion that the ground on which the decree for restitution of conjugal rights was granted viz. desertion of the appellant because the respondent had kept a mistress, got exhausted itself and it would not be open to the appellant wife to fall back upon it after the Court pronounced the judgment in her favour and determined about the guilt of one of the parties. Filing of appeal against decree for restitution of conjugal rights cannot be treated as reprehensible or repulsive conduct on the part of the husband so as to disentitle him from claiming relief of decree of divorce because the statute itself gives right to an aggrieved party to prefer an appeal against the decree for restitution of conjugal rights. Filing of an appeal by an aggrieved party against decree for restitution of conjugal rights cannot be treated as reprehensible or repulsive misconduct on his or her part so as to entitle him or her from claiming decree of divorce. As observed earlier, it was the case of the appellant-wife that even prior to granting of decree for restitution of conjugal rights, the husband was living an adulterous life with Shardaben. It is true that the respondent-husband had never shown inclination to withdraw from the society of Shardaben with whom, according to the appellant-wife, the respondent-husband was living adulterous life since 1971. But, in the light of the principles laid down by the Division Bench in Bai Mani (Supra) it will have to be held that that was not a conduct on the part of the respondent subsequent to passing of the decree for restitution of conjugal rights and ground of adultery got exhausted after the said decree was passed. The above discussion makes it clear that the appellant-wife has failed to establish that the respondent was taking advantage of his own wrong and, therefore, was not entitled to a decree of divorce. The appellant-wife has admitted in her evidence that the respondent hates her and is not inclined to keep her with him. In this case, though marriage between the parties took place in the year 1969, reconciliation had not been possible. The respondent had developed illicit connection with Shardaben since 1971 and has children through her. Therefore, not granting divorce to the respondent would result in great misery to Shardaben and her children.

Having regard to the totality of the facts and

circumstances of the case, we are of the opinion that no error is committed by the learned Single Judge in upholding the decree of divorce passed by the Trial Court. The learned Counsel for the appellant has filed to point out any defect or error in the impugned judgment rendered by the learned Single Judge so as to warrant our interference in the present appeal. The appeal, therefore, cannot be allowed and is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed, with no orders as to costs.

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(patel)